NO. 21055

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMES EWING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

On January 19, 1966, the Federal Grand Jury for the Southern District of California, Southern Division, returned a two-count indictment (36097-SD) charging the appellant James Ewing in Count One with a violation of Title 21, United States Code, Section 174 (conspiracy to smuggle narcotics) and in Count Two with a violation of Title 21, United States Code, Section 176(a) conspiracy to smuggle marihuana [C.T. 2-4].[1/]

A prior indictment numbered 34738-SD[2/] naming appellant James Ewing

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1/ "C.T." refers to Clerk's Transcript.

2/ The appellant in his designation of record did not include this indictment [C.T. 7, 9].

and Clarence Currie as defendants had evidently been returned by the Federal Grand Jury. Though the record is not entirely clear, it appears that there were four counts. The appellant Ewing and Currie were charged in Count One with conspiracy to import cocaine; in Counts Two and Three with aiding and abetting the smuggling of cocaine; and in Count Four Currie was charged with failure to register. [R.T. 3-4, 9-10] .[3/]

The two cases were consolidated for trial. Count Four of the indictment numbered 34738-SD which charged Currie with failure to register was severed. After three days of jury trial Currie was found guilty by the jury as to Counts One, Two and Three in 34738-SD and the appellant Ewing was found guilty as to Count Two in 36097-SD (conspiracy to smuggle marihuana) [R.T. 29, 349-351].

The appellant was sentenced by the Honorable Fred Kunzel to a 20-year period of incarceration. A timely Notice of Appeal was filed by the appellant. A Motion for New Trial was granted as to Currie [C.T. 5-6; R.T. 361, 367] .

The jurisdiction of the United States District Court for the Southern District of California, Southern Division, was based on Title 21, United States Code, Section 176(a) and Title 18, United States Code, Section 3231.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

/ "R.T." refers to Reporter's Transcript.

II

STATUTES INVOLVED

Title 21, United States Code, Section 176(a) reads in pertinent part as follows:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000 . . . ." [Emphasis added].

III

STATEMENT OF THE CASE

A. Questions Presented.

1. Did the Trial Court commit plain error in joining indictments numbered 34738-SD and 36097-SD for trial?

2. Did the Trial Court commit plain error by informing the jury that the unindicted co-conspirator was deceased?

3. Did the Trial Court commit plain error by allowing the government to prove that the appellant had offered a government witness

money to absent herself from the trial?

4. Did the Trial Court commit plain error by allowing the government to impeach a witness who testified at the trial contrary to a statement he had given a Federal agent?

5. Did the Trial Court commit plain error by allowing a government witness to testify that a cigarette, which had been rolled in her presence and which made her high, was marihuana?

6. Did the government prove that the appellant conspired to smuggle marihuana?

7. Did the Trial Court commit plain error in his comments to the jury?

B. Statement of the Facts.

In 1957 Marilyn Jackson met James Thomas in New Jersey and began living with him in a common-law relationship. In 1958 they moved to California and lived in Los Angeles, along with her minor son [R.T. 49-51,56].

In early 1963 James Thomas was introduced to James Ewing by William Carter at the Thomas residence in Los Angeles. Discussions took place regarding the transportation of marihuana from Tijuana, Mexico, to Los Angeles, California. It was determined that James Thomas would be paid $200 for each trip he made to Tijuana, Mexico, to pick up marihuana for James Ewing [R.T. 40, 42-44, 51, 53, 57, 68, 85, 88-89, 109].

As a result of the discussions, James Thomas agreed to drive to Tijuana, Mexico, to pick up marihuana and deliver it to Los Angeles for

James Ewing. Usually James Thomas was accompanied by Marilyn Jackson and her minor son, and occasionally James Ewing rode with them, though he normally met them in Tijuana, Mexico. James Ewing furnished his car to James Thomas and paid him approximately $200 after each trip was completed [R.T. 54, 55, 58, 69, 71-72, 89, 95-101].

The normal procedure that was followed was that James Ewing would contact a Mexican after they arrived in Tijuana, Mexico. James Thomas and Marilyn Jackson, along with her son, would drive James Ewing's car and follow James Ewing and the Mexican to a location outside of town. Then potato or gunny sacks containing marihuana would be placed in the trunk of the Ewing vehicle. They would then drive from Tijuana, Mexico, to the Ewing residence in Los Angeles, California [R.T. 58-60, 65-66, 95].

James Ewing would then take the sacks into his garage. He on one occasion brought two boxes wrapped in brown paper from the garage into his house. Ewing and Thomas weighed the boxes and commented that they did not weigh as much as they thought. Ewing gave James Thomas and Marilyn Jackson some marihuana in a brown paper bag. They then rolled and smoked some marihuana cigarettes and Marilyn Jackson, who was familiar with marihuana, got high. [R.T. 65-69, 89, 96-98].

Similar trips were made by James Thomas, Marilyn Jackson and her son during 1963 [R.T. 64-65, 71-72, 101-103, 105-107].

On one occasion in Tijuana, Mexico, James Ewing gave James Thomas some powder in a cellophane package. This was also delivered to the Ewing residence. Ewing told James Thomas that the buyer in Chicago was complaining

this alleged error in this Court. Further, the joinder of the two cases for trial was in no way prejudicial to the appellant.

The Trial Court did not commit plain error by informing the jury that the unindicted co-conspirator was now deceased. The reason for the absence of the unindicted co-conspirator could have been shown by the prosecutor in his case-in-chief. However the doctrine of judicial notice allows the Trial Court to inform the jury of the death of the unindicted co-conspirator.

The Trial Court did not commit plain error by allowing the government to prove that the appellant had offered a government witness money to absent herself from the trial.

The Trial Court did not commit plain error by allowing the government to impeach a government witness who testified at the trial contrary to a statement he had given a federal agent. The prosecutor was surprised and was properly allowed to impeach his own witness.

The Trial Court did not commit plain error by allowing a government witness to testify that a cigarette, which had been rolled in her presence and which made her high, was marihuana. The record shows a sufficient factual basis for the conclusion of the witness that the cigarette she smoked, which made her high, was marihuana. Further the testimony concerning the fact that the cigarette was marihuana was merely cumulative of other testimony to which the appellant did not object.

The government proved that the appellant conspired to smuggle marihuana. The first two overt acts alleged were proven by the government. Of course overt acts need not be pleaded in a conspiracy to smuggle

marihuana, and if they are, they are surplusage.

The Trial Court did not commit plain error in his comments to the jury. The comments to the jury were fair and proper and the Trial Court properly instructed the jury concerning the effect of his comments.

V

ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN JOINING INDICTMENTS NUMBERED 34738-SD and 36097-SD FOR TRIAL.

Appellant now alleges, for the first time, that the joinder of the two indictments for trial was prejudicial as to him. Appellant has failed procedurally to perfect his record relating to this alleged error on two grounds.

First, the appellant in his desingation of record to this Court did not include the indictment in 34738-SD [C.T. 7, 9] . Though there are general statements in the record concerning the Counts in that indictment [R.T. 3-4, 9-10], speculation is required on the part of this Court in determining just who and what was charged in that indictment.

Second, the appellant failed to object to the consolidation of the two indictments for trial on the ground that the consolidation would be prejudicial to him. The objection made by the appellant alleged that the consolidation was prejudicial as to the co-defendant Currie. There was no compliance by the appellant with Rule 51 of the Federal Rules of Criminal Procedure, which reads in pertinent part as follows:

"Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the Court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; . . ." (Emphasis added.)

The Government will not speculate on the reasons for appellant's failure to object to the consolidation on his own behalf. This tactical decision, made at the trial level, should not now be considered, unless there is "plain error" within Rule 52(b) of the Federal Rules of Criminal Procedure.

Ramirez v. United States (9 Cir. 1961) 294 F.2d 277;

Fiano v. United States (9 Cir. 1959) 271 F.2d 883, cert. denied 631 U. S. 964.

The record in this case seems to reveal that in 34738-SD appellant was charged in Count One with conspiracy to import cocaine, and in Counts Two and Three with aiding and abetting the smuggling of cocaine. The date of the alleged offenses is not clear from this record. In 36097-SD the appellant was charged in Count One with conspiracy to smuggle narcotics and in Count Two with conspiracy to smuggle marihuana. Thus, the appellant was prosecuted in multiple counts for conspiracy to smuggle cocaine and marihuana and aiding and abetting the smuggling of cocaine.

Apparently the appellant and James Thomas were involved in the entire transaction. However, Mr. Currie, as far as the record shows, was only

involved in the cocaine aspect of the transaction.

If there was any error, it was error for the trial court to allow the case against Currie, who was only involved in the cocaine, to be affected by the testimony relating to the marihuana. Counsel for the appellant obviously agreed with this analysis as his objections appeared to be on behalf of Currie and not his client.

Of course the Trial Court on the day of sentencing resolved the possible prejudicial effect the marihuana testimony may have had as to Currie by granting a Motion for New Trial.

It was noted, in fairness to the prosecutor in this case, that at the trial of this matter he was faced with many problems relating to the proof of the narcotics aspects of the indictment. Mr. Thomas was dead, and Mr. Carter, and Mr. Sutton were recalcitrant witnesses. However, the record is entirely clear, when viewed in the light most favorable to the government, concerning the marihuana aspects of this case.

It is respectfully suggested that the appellant did not procedurally perfect his record concerning the error relating to consolidation. Further, if there was error relating to the consolidation, the error affected Mr. Currie and in no way affected the appellant.

B. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY INFORMING THE JURY THAT THE UNINDICTED CO-CONSPIRATOR WAS DECEASED.

Evidently the Trial Court informed the jury that one of the unindicted

co-conspirators was deceased. A Motion for Mistrial was made and denied. The appellant now contends that an innocuous statement to the jury at the beginning of a three day trial was plain error.

It is diffidult to understand how the statement referred to could in this case amount to plain error. The trial judge could have taken judicial notice of the fact that one of the unindicted co-conspirators was deceased.

Brown v. Riper (6 Cir. 1964) 331 F.2d 600;

McCormick, Evidence, 710 (1954).

If the Trial Court had not informed the jury of the fact that one of the unindicted co-conspirators was deceased at the time of trial then the government would have been required to prove this fact in order to avoid the obvious defense argument. This proof would of course have been material and relevant.

C. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY ALLOWING THE GOVERNMENT TO PROVE THAT THE APPELLANT HAD OFFERED A GOVERNMENT WITNESS MONEY TO ABSENT HERSELF FROM THE TRIAL.

Marilyn Jackson, the common-law wife of James Thomas, the main government witness in this case, testified in substance, that the appellant offered her money to absent herself from the trial.

In order to prove intent the government is entitled to prove conduct of the appellant subsequent to the crime which amounts to obstruction of justice. It is material and relevant to prove that the appellant offered a government

vitness money to absent herself from the trial.

D. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY ALLOWING THE GORENMENT TO IMPEACH A GOVERNMENT WITNESS WHO TESTIFIED AT THE TRIAL CONTRARY TO A STATEMENT HE HAD GIVEN A FEDERAL AGENT.

Mr. Jefferson Sutton was called as a government witness. Prior to the rial the witness had been interviewed by a Customs agent. That interview vas reduced to writing. Subsequently another interview with the same Customs gent took place and the witness again related information similar to the first nterview. Subsequently, another Assistant United States Attorney interviewed he witness and the witness again related information similar to the first inter- iew. Approximately one week before the trial the witness talked briefly to the rosecutor and in response to a query as to whether or not he was going to estify in accord with his original interview with the Customs agent the witness old the prosecutor - "I can't possibly tell you what my position is going to be." he prosecutor was informed prior to calling the witness that in prior interviews ne witness had responded in accord with his original interview by the Customs gent [R.T. 218-222, 226-229]. The witness then testified that he had lied to ne Customs agent. It should be noted that no specific questions, which could ave been highly prejudicial to the appellant, were asked by the Trial Court or ne prosecutor concerning what the witness had told the Customs agent when irst interviewed [R.T. 208-219, 240-241].

The prosecutor in this case properly claimed surprise, and was properly

allowed to impeach the witness. The prosecutor, who had a tape of the Customs Agent's original interview with the witness could have used the tape recording to impeach the witness.

Debardeleben v. United States (9 Cir. 1962) 307 F.2d 362; and

Bieber v. United States (9 Cir. 1960) 276 F.2d 709.

As far as this alleged error, the record reveals that the treatment of the appellant by the Trial Court and the prosecutor was in keeping with the standards of fundamental fairness set forth in Berger v. United States (1935) 295 U. S. 78.

E. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY ALLOWING A GOVERNMENT WITNESS TO TESTIFY THAT A CIGARETTE, WHICH HAD BEEN ROLLED IN HER PRESENCE AND WHICH MADE HER HIGH, WAS MARIHUANA.

The appellant, James Thomas and Marilyn Jackson during 1963 discussed smuggling of marihuana from Mexico to Los Angeles. The appellant paid James Thomas to smuggle marihuana from Tijuana, Mexico, to Los Angeles. The appellant either rode with James Thomas and Marilyn Jackson to Tijuana or met them in Tijuana.

On at least one occasion potato or gunny sacks were loaded into a vehicle which James Thomas drove from Tijuana to the appellant's residence in Los Angeles. The sacks were taken into a garage at the appellant's residence and the appellant came out of the garage with two boxes wrapped in brown paper. The boxes were weighed in the appellant's residence. The appellant

then broke open one of the boxes and put some in a bag. James Thomas, while at the appellant's residence rolled a couple of cigarettes and he and Marilyn Jackson each smoked one of the cigarettes. The cigarette made Marilyn Jackson high.

At the trial Marilyn Jackson testified that the material she smoked made her high. She further testified that the material she smoked was "reefers." In response to a question from the trial court Marilyn Jackson said the material was marihuana [R.T. 68-70] .

The appellant now contends that the Trial Court committed plain error in allowing Marilyn Jackson to testify that the cigarette she was smoking was a marihuana cigarette.

The record shows that there was no objection made by the appellant to the testimony of Marilyn Jackson regarding the fact that the cigarette made her high and was a reefer [R.T. 69].

Thus the only question for this Court's consideration is whether or not the Trial Court's question as to whether or not the cigarette was marihuana was plain error within Rule 52 of the Federal Rules of Criminal Procedure.

Under a strict application of the so-called "opinion rule", the expressions of opinion or conclusions by a lay witness are generally not admissible into evidence. The strict interpretation allows the lay witness to testify only as to facts.

However, the trial judge is generally permitted, in his discretion, to allow opinions or conclusions of lay witnesses based on personal observation.

United States v. Trenton Potteries (1927) 273 U. S. 392;

Zinberg v. United States (1 Cir. 1944) 142 F.2d 132;

United States v. Petrowe (2 Cir. 1950) 185 F.2d 334.

It is obvious here that Marilyn Jackson was involved, along with her common-law husband, and the appellant, in a conspiracy to smuggle marihuana; that Marilyn Jackson knew that marihuana was being smuggled from Tijuana to Los Angeles; that on at least one occasion the appellant after placing the potato or gunny sacks in his garage took two boxes from the garage wrapped in brown paper; that Marilyn Jackson and James Thomas received a bag of material from the two boxes and some of the material was rolled into cigarettes; and that the cigarette Marilyn Jackson smoked made her high.

It is respectfully submitted that the opinion or conclusion by Marilyn Jackson that the substance she smoked was marihuana was proper in that it was based upon her personal observations and experience.

Notwithstanding the foregoing analysis this record indicates that the appellant failed to object when Marilyn Jackson testified that the cigarette she smoked made her high and was a "reefer." [R.T. 69]. Under Rule 51 of the Federal Rules of Criminal Procedure and Rule 18 of this Court the appellant has waived any error as to the testimony of Marilyn Jackson that she smoked a cigarette which was a "reefer" and which made her high.

Of course "reefers" and marihuana are one and the same and if the testimony concerning the fact the cigarette was marihuana was improper it was merely cumulative and harmless error.

Gordon v. United States (6 Cir. 1948) 164 F.2d 855.

F. THE GOVERNMENT PROVED THAT THE APPELLANT CONSPIRED TO SMUGGLE MARIHUANA.

The appellant contends that the government did not prove the conspiracy to smuggle marihuana in that no overt act was proved.

Overt act number one alleges that on or about March 15, 1963, James Thomas brought marihuana into the United States. According to Marilyn Jackson several trips were made to Tijuana, Mexico, by James Thomas and herself to pick up marihuana for the appellant during 1963. One of the trips was made in the early summer and several weeks after January 15, 1963, the date of the death of her father. [R.T. 62-64, 86, 100].

When the evidence concerning the first overt act charged is viewed in the light most favorable to the government, as it must be under Glasser v. United States (1942) 315 U. S. 60, the evidence shows that James Thomas brought marihuana into the United States on a date reasonably near the date alleged.

Ledbetter v. United States (1898) 170 U. S. 606.

The second overt act alleges that Jefferson Sutton left the United States on or about December 29, 1963 to meet the appellant in Tijuana, Mexico. The evidence shows that in the latter part of the summer of 1963, after Marilyn Jackson and James Thomas had made six or seven trips to Tijuana, Mexico, Jefferson Sutton and Marilyn Jackson went to Tijuana and met with the appellant. Sutton was going to take James Thomas's place, and Marilyn

Jackson was going to show him where to go. [R.T. 65, 75-77].

When viewed in the light most favorable to the government it is respectfully suggested that this record shows the government proved the second overt act.

Even though the government proved the overt acts previously referred to, it is clear that in a charge of conspiracy to smuggle marihuana overt acts need not be pleaded and when overt acts are pleaded they are surplusage.

Leyvas v. United States (9 Cir. 1967) 371 F.2d 714.

G. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN HIS COMMENTS TO THE JURY.

The trial judge pointed out to the jury certain evidence in the case. However, the trial judge made clear to the jury that any comments made by him could be completely disregarded by the jury in making their determination. [R.T. 340-342].

It is clear that the Trial Court may comment on the evidence in a case.

Murdock v. United States (1933) 290 U.S. 389;

Henry v. United States (9 Cir. 1951) 186 F.2d 521.

The Trial Court here commented fairly on the evidence and properly instructed the jury concerning the effect of his comments on their decision.

VI

CONCLUSION

The Government respectfully submits that the appellant's conviction should be affirmed.

Respectfully submitted,

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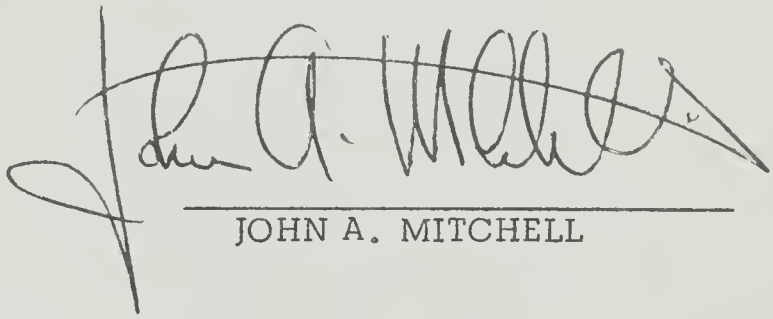
CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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